United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 28, 1996

TO : F. Rozier Sharp, Regional Director
Region 17

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Oklahoma Installation Company
Case 17-CA-18500

This Section 8(a)(5) and 8(f) case was submitted for advice as to: (1) whether the Union is the Section 9(a) representative of the carpenter employees employed by the Employer within the Union's jurisdiction; and (2) whether, if the Union is not the Section 9(a) representative, what is the effect of the Employer signing a Recognition Agreement and Letter of Assent with the Union which provided that the Employer be bound by a contract between the Union and another employer "including any extensions, renewals or modifications" thereto, where that contract has expired and a new agreement has not yet been negotiated.

FACTS

Oklahoma Installation Company (OIC) is engaged in the installation of retail store fixtures and custom woodwork. The Region found that OIC is an employer in the construction industry. Oklahoma Fixture Company (OFC) is engaged in the manufacture and installation of retail store fixtures and custom architectural woodwork.

The United Brotherhood of Carpenters and Joiners Local Union No. 943 (Union) filed charges in Cases 17-CA-16321 and 17-CA-16380 alleging that these two companies were alter ego/single employers. The cases were set for trial in 1993, but were settled when OIC agreed to execute a Recognition Agreement and Letter of Assent on February 16, 1993. This document states in relevant part:

> 1. The Union has submitted, and the Employer is satisfied that the Union represents a majority of its employees in a unit that is appropriate for collective bargaining.
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> 2. The Employer recognizes the Union as the exclusive collective bargaining agent for its employees who

> perform carpentry and construction work within the jurisdiction of the Union on all present and future job sites. The employer, from the date of this letter of assent, agrees to be bound by the terms and conditions, including any extensions, renewals or modifications of a certain collective bargaining agreement between Oklahoma Fixture Company and Carpenters Local Union 943 covering outside construction work dated the 26th of February, 1993...
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> This letter of assent, to be bound by the Collective Bargaining Agreement between the Oklahoma Fixture Company and Carpenters Local Union 943, covering outside construction work, shall remain in effect until terminated by the undersigned employer by giving written notice to the Union...at least 150 days prior to the then-current anniversary date of the collective bargaining agreement between Oklahoma Fixture Company and Carpenters Local Union 943 covering outside construction work. (emphasis added)

The Region found that on February 16, 1993, when the parties executed the Recognition Agreement and Letter of Assent, there were no employees working within the jurisdiction of the Union, although OIC employed carpenters both before and after the execution of the Recognition Agreement.[1] Under the Recognition Agreement, the Union and OIC bound themselves to the collective bargaining agreement between OFC and the Union which expired by its terms on May 31, 1995 and contained a provision for 90 days notice.[2] OFC gave timely notice pursuant to that provision on January 13, 1995. OFC and the Union have bargained over a new contract but have not reached agreement. OIC never gave notice under the Recognition Agreement provision which set forth a requirement for "at least 150 days" notice.

The Region found that OIC was working in the Union's jurisdiction in August or September 1995 at Dillards Department Store doing remodeling work. OIC has not made

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[1] According to OIC, there were carpenters employed by OIC in the Union's jurisdiction in 1991, at a bank remodeling job, and none again until August 1995. The Union claims that this bank remodeling job was completed at the end of January 1993.

[2] The Region found that the Union was certified as the Section 9(a) representative of OFC's employees.

requests for carpenters under the Union's referral system, nor has it made payments into benefit funds. In addition, OIC has paid its employees a rate of $10 per hour, i.e. $3.50 below the contract rate. OIC continues to work within the Union's jurisdiction and continues to not abide by the terms and conditions of employment set forth in the expired agreement between the Union and OFC.

OIC and OFC are also the subject of an alter ego/single employer allegation pending before the Board on a Motion to Transfer and Stipulation of Facts in Case 16-CA-16265. The motion was submitted to the Board on February 26, 1996. On March 13, 1996, the instant charge was filed by the Union and alleged that OIC has failed to honor a written Recognition Agreement and Letter of Assent by employing individuals within the Union's jurisdiction below contract wage and fringe benefit levels.

OIC claims that it has a Section 8(f) relationship with the Union and that the Recognition Agreement and Letter of Assent bound the parties to the OFC contract and that OFC's timely termination of the contract also terminated the Recognition Agreement and Letter of Assent. OIC also claims that the Union was required to make a contemporaneous showing of majority support among the OIC employees at the time the Recognition Agreement and Letter of Assent was signed. OIC states that the Union could not do this since there were no employees working in the Union's jurisdiction in February 1993. OIC claims that it was therefore free to walk away from its relationship with the Union once the OFC collective bargaining agreement expired.

The Union contends that OIC never gave timely notice under the Recognition Agreement and Letter of Assent and that, by its terms, OIC remains bound to the terms and conditions of employment set forth in the collective bargaining agreement between the Union and OFC.

ACTION

We conclude that a Section 8(a)(5) and (1) complaint should issue, absent settlement, for the reasons set forth below.

In Deklewa, the Board held that a party asserting the existence of a 9(a) relationship has the burden of proving

it.[3] More particularly, in Deklewa, the Board discussed the requirements for a 9(a) relationship in the construction industry.[4] The Board stated that in the event of a Board election, a vote in favor of a union would result in that union's certification and the full panoply of Section 9(a) rights and obligations.[5] The Board also indicated that in the construction industry, as elsewhere, an employer may enter into a Section 9(a) collective-bargaining relationship by voluntarily recognizing the union based on a clear showing of majority support among the employees.[6]

The Board specifically addressed the issue of voluntary 9(a) recognition in the construction industry in J & R Tile.[7] The Board held that to establish voluntary recognition pursuant to Section 9(a) of the Act in the construction industry there must be evidence that the union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such.[8]

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[3] John Deklewa & Sons, Inc., 282 NLRB 1375, 1385 fn. 41 (1987). Similarly, in Casale Industries, Inc., 311 NLRB 951, 952 (1993), the Board stated that it is presumed that parties in the construction industry intend their relationship to be an 8(f) relationship, and the burden of proof is on the party who seeks to prove the 9(a) relationship.

[4] John Deklewa & Sons, Inc., above, at 1385.

[5] Id.

[6] Id. at 1387, fn. 53.

[7] J & R Tile, Inc., 291 NLRB 1034, 1036 (1988).

[8] Id. In J & R Tile, there was evidence that the union represented an uncoerced majority of the employees and that the employer was aware of the union's majority support. However, no evidence was presented showing that the union either demanded recognition as the Section 9(a) representative or that the Employer expressly designated the Union as the 9(a) representative. Id. at 1037.

In Triple A Fire Protection,[9] however, the Board held that there was sufficient evidence to find that voluntary recognition occurred. The evidence indicated that the union sent a letter to the employer requesting that the employer sign a form recognition agreement.[10] The purpose of obtaining the signed form was to confirm the union's status as the current exclusive bargaining representative of the employees. The union enclosed a fringe benefit report, containing a list of eight names, along with the recognition form. The employer signed the recognition form. The employer had testified that the greatest number of workers employed for a given month was seven or eight. The ALJ concluded that the parties had an 8(f) rather than a 9(a) relationship, because "9(a) status requires a more 'affirmative' showing of majority support 'manifested' by unit employees."[11] The Board disagreed with the ALJ and held that the union was the Section 9(a) representative. The Board determined that the union made an unequivocal demand for recognition as the 9(a) representative by sending the employer the form, proffered documentary evidence which purported to support the union's claim of majority status, and the employer voluntarily and unequivocally granted recognition to the union as the 9(a) representative by signing it.[12] Thus, the Board found that the parties had established a Section 9(a) collective-bargaining relationship.[13]

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[9] Triple A Fire Protection, Inc., 312 NLRB 1088 (1993); See Golden West Electric, 307 NLRB 1494, 1495 (1992).

[10] Triple A Fire Protection, above. In Triple A Fire Protection, the recognition form read as follows: "the employer executing this document has confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, road sprinkler fitters local union no. 669. The employer, therefore, unconditionally acknowledges and confirms that local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a)." Id.

[11] Id.

[12] Id.

[13] Id.

In assessing Section 9(a) collective-bargaining relationships in the construction industry, the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries.[14] In Casale Industries, Inc.,[15] the Board elaborated upon this point stating that parties in nonconstruction industries, who have established and maintained a stable Section 9(a) relationship, are entitled to protection against a tardy attempt to disrupt their relationship.[16] Thus, the Board indicated that parties in the construction industry are entitled to no less protection.[17] Accordingly, the Board determined that a challenge to majority status must be made within a reasonable period of time after Section 9(a) recognition is granted. The Board found that if 6 months elapsed without a charge or petition, the Board will not entertain a claim that majority status was lacking at the time of recognition.[18]

In the instant case, we conclude, first, that the Union is the Section 9(a) representative of the carpenter employees employed by the OIC within the Union's jurisdiction. The Union submitted the Recognition Agreement and Letter of Assent to OIC thereby making an unequivocal demand for recognition as the 9(a) representative of OIC's unit employees. In paragraph 1 of the Recognition Agreement

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[14] Deklewa, above, 282 NLRB at 1387, fn. 53.

[15] 311 NLRB at 953.

[16] Id.

[17] Id. In Casale, the union disaffiliated from the International and sought recognition as the exclusive 9(a) bargaining agent for all employees employed by association members. The union won a non-board conducted election and was recognized as the 9(a) bargaining representative by the Association. The employer later tried to challenge majority status since there was no separate tally of Casale's employees' votes and therefore there was no evidence that the Employer's employees designated the Union as the 9(a) representative. The challenge was denied because it was made substantially more than 6 months after the grant of Section 9(a) recognition. Id., at 951-953.

[18] Id., at 9533.

and Letter of Assent, OIC expressly recognized the Union as the Section 9(a) representative of its employees in the Union's jurisdiction. Significantly, this document expressly states that the Union presented OIC with satisfactory evidence of the Union's majority status. Thus, it is clear from the terms of Recognition Agreement and Letter of Assent that the parties intended to establish a bargaining relationship under Section 9(a) of the Act.[19] Although the precise nature of the proferred evidence of majority status is not set forth, OIC specifically stated in this document that it was satisfied that the evidence established that the Union was the Section 9(a) representative of its employees. Moreover, OIC honored the terms of its agreement with the Union for approximately three years. Within this entire three year period, OIC never challenged the Union's majority status. Since OIC failed to make such a claim within 6 months after recognizing the Union as the Section 9(a) representative, OIC would now be precluded from challenging the Union's majority status.[20] Therefore, OIC's challenge to the Union's Section 9(a) status, almost three years after entering into the Recognition Agreement and Letter of Assent is untimely.[21] Accordingly, we conclude that the Union is the Section 9(a) representative of OIC's carpenter employees in the Union's jurisdiction.[22]

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[19] See Golden West Electric, 307 NLRB 1494 (1992).

[20] Id.

[21] Triple A Fire Protection, Inc., above, at p. 1089.

[22] [*FOIA Exemptions 2 and 5*

OIC's defense that the Recognition Agreement and Letter of Assent did not establish a Section 9(a) relationship, because OIC did not have any employees on the precise day that it signed this document, February 16, 1993, is without merit. In this regard, we note that, contrary to OIC's assertion, OIC did employ carpenters in the Union's jurisdiction around the time that OIC signed the Recognition Agreement and Letter of Assent. Specifically, the Union stated that OIC employed carpenters until the end of January 1993; approximately two weeks prior to the signing of the Recognition Agreement and Letter of Assent.[23] Moreover, OIC has expressly stated in writing that, at the time it entered into the Recognition Agreement and Letter of Assent, it was satisfied that the Union was the majority representative. Under all of these circumstances, we conclude that OIC's defense is without merit.[24]

Second, we conclude that the Region should not argue in the alternative that, absent the Section 9(a) relationship

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FOIA Exemptions 2 and 5

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[23] The Union stated that OIC employed carpenters in the Union's jurisdiction on the bank remodeling job completed at the end of January 1993.

[24] In this regard, we note that even assuming, arguendo, that OIC's 9(a) recognition of the Union was in violation of Section 8(a)(2) of the Act, because the Union had not produced sufficient evidence of its majority status, the validity of the Section 9(a) relationship would now be unassailable under Section 10(b) of the Act.

established by the Recognition Agreement and Letter of Assent, OIC was obligated to maintain the terms and conditions of employment after the expiration of the OFC agreement. In this regard, we note that the Recognition Agreement and Letter of Assent, aside from the provision granting Section 9(a) recognition, merely binds OIC to the OFC contract and its extensions, renewals or modifications. However, at the time of OIC's alleged unilateral changes, the OFC agreement had expired and there were no extensions, renewals or modifications of the OFC contract. Under such circumstances, there was no contract to which OIC was bound. Therefore, since OIC would only have an 8(f) relationship with the Union, it would be free to unilaterally change the terms and conditions of employment of its carpenter employees working in the Union's jurisdiction.

Accordingly, the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement, for the reasons set forth above.

B.J.K.